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No. 87-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,

Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE STATES IN OPPOSITION TO PETITION FOR CERTIORARI

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Question Presented

The Amici Curiae States of Wyoming, New Mexico, Colorado, Utah, Arizona and Nevada disagree with the question framed by the Government in its Petition for Certiorari.

Both uranium and enrichment services are necessary to produce nuclear fuel for nuclear power reactors and military applications. The provision of enrichment services is a government monopoly worldwide, and the Department of Energy (DOE) is the sole domestic enricher in the United States. DOE enrichment policies thus have had, and continue to have, a profound impact on the health of the domestic uranium industry.

Under section 161v. of the Atomic Energy Act, 42 U.S.C. 2201v., the federal Government "shall" establish written terms and conditions for the provision of enrichment services, "shall" include in those terms and conditions the conditions governing enrichment of foreign-source uranium for domestic end-use, and "shall not offer" enrichment services for foreign-source uranium for domestic end-use "to the extent necessary to assure the maintenance of a viable domestic uranium industry." The Government possesses supplementary authority under, *inter alia*, sections 161b. and p. of the Atomic Energy Act, 42 U.S.C. 2201b. & p., to limit importation of uranium or enriched uranium for domestic end-use.

The federal Government admits that the domestic uranium industry is in fact "non-viable." Yet it has done nothing even remotely effective to restore, much less maintain, the domestic industry's viability. The question presented in this case is whether the Gov-

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Brief of Amici Curiae States in Opposition to Petition for Certiorari

Amici Curiae States of Wyoming, New Mexico, Utah, Colorado, Nevada, and Arizona hereby oppose the petition for certiorari filed on behalf of Petitioners Huffman, et al. (hereinafter referred to collectively as the "Department of Energy" or DOE"). The petition for certiorari is directed against an injunction, issued by the United States District Court for the District of Colorado, and unanimously affirmed by the United States Court of Appeals for the Tenth Circuit, requiring DOE to halt enrichment of foreign-source uranium for domestic end-use as required by section 161v. of the Atomic Energy Act ("AEA") 42 U.S.C. 2201v., pending a rulemaking.

The unanimous rulings below present no conflict in the circuits, nor does the result reached by the courts below raise questions of sufficient significance to warrant review by this Court. The government's petition for certiorari should accordingly be denied.

I. INTEREST OF AMICI

As the Amici States have indicated in papers filed in the proceedings below, the end sought by the Department of Energy in the instant Petition, namely, continued avoidance of discharging its obligation to assure the maintenance of a viable domestic uranium industry, is causing, and will continue to cause, serious harm to the economies of the Amici States. DOE's actions, or more appropriately, inactions, are also resulting in severe harm to many local communities as well as to the citizens of the Amici States which have relied upon the domestic uranium industry for employment opportunities and tax revenues. Section 161v. represents a commitment to uranium-producing States that they could safely invest in the infrastructure necessary to support an important mineral industry because the federal government would assure that the industry was not in general subject to the boom and bust cycle which so often afflicts other extractive industries. While the commitment may be subject to revision by Congress, it is not subject to the whim of unelected officials in charge of DOE's enrichment program.

II. STATEMENT OF FACTS

A. Nuclear Fuel

Nuclear fuel used in civilian nuclear power reactors in the United States and most of the rest of the world is comprised of two basic inputs: natural uranium (called, in the terminology of the Atomic Energy Act, "source material"[1] and enrichment services. Enrichment services are employed to raise the proportion of fissionable isotope Uranium-235 to about 3% from the normal proportion of about 0.7% which occurs in nature. The provision of enrichment services is a government monopoly worldwide. In the United States, the sole domestic enricher is the United States Department of Energy ("DOE"), which, like

[1] 42 U.S.C. 2014(z).

the Nuclear Regulatory Commission ("NRC"), is a successor agency to the old Atomic Energy Commission ("AEC").[2]

B. The Interconnection between Uranium and Enrichment and the Adoption of Section 161v. of the Atomic Energy Act.

Since uranium and enrichment services can be combined in different ways to produce a given quantity of nuclear fuel (called enriched uranium, or, in the terminology of the AEA "special nuclear material"[3]), the policies of the government with respect to the provision of enrichment services can and do have a profound impact on the demand for natural uranium, which in the United States is privately supplied.[4] Originally the government was the sole lawful owner of nuclear fuel in the United States.[5] When private ownership of nuclear fuel was authorized in 1964,[6] Congress was concerned that federal enrichment policies not whipsaw the private uranium industry, and that the Nation's private uranium industry be maintained in a viable condition in order to assure our energy independence and national security with respect both to nuclear fuel and

[2] Under the Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233, the AEC was abolished and its atomic energy regulatory functions were transferred to the Nuclear Regulatory Commission, while its enrichment activities were transferred to the Energy Research and Development Administration (ERDA). 42 U.S.C. 5813 & 5814(c). ERDA was abolished and its functions transferred to DOE by the DOE Organization Act of 1977. 42 U.S.C. 7151(a).

[3] 42 U.S.C. 2014(aa).

[4] *See, e.g., Proceedings of the Tri-Committee Business Advisory Panel on Uranium Enrichment*, House Energy and Commerce Comm. Serial No. 98-160, 98th Cong., 2d Sess. at 38-39 (1984) (DOE witness notes the significant interchangeability of enrichment and natural uranium by analogy to a cider press).

[5] *See* section 52 of the AEA of 1954, 68 Stat. 929-30 (repealed).

[6] P.L. 88-489, 78 Stat. 702.

to fissionable material.[7] Congress accordingly adopted section 161v. of the AEA, 42 U.S.C. 2201v. That section provides, among other things, that the AEC (now the DOE) must adopt written "criteria" governing the provision of enrichment services and that the agency must limit enrichment of foreign source uranium for domestic end-use to the extent necessary to "assure the maintenance of a viable domestic uranium industry."[8]

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[7] Congress specifically observed that "[t]he maintenance of a domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital" to national security interests. 1964 U.S. Code Cong. & Admin. News 3115 & 3135. In responses to questions propounded by a House Committee, DOE more recently admitted that the domestic uranium industry continues to have national security significance:

> "Q.9 Why is a viable uranium industry vital to the interests of our nation?
>
> Answer: The domestic uranium industry implicates the vital interests of our Nation because a significant fraction of the Nation's electricity is generated by nuclear power and our strategic defense has a major nuclear component. Congress recognized the strategic importance of this industry in the Atomic Energy Act of 1954.

Domestic Uranium Mining Industry, Hearings before the Energy Cons. & Power Subcomm. of the House Energy & Comm. Comm., 99th Cong., 1st Sess., at 66 (1985).

[8] Section 161v. provides in pertinent part as follows: "the Commission [now DOE], to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials [uranium] of foreign origin intended for use in a utilization facility [nuclear power reactor] within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. . . ."

C. The Non-Viable Condition of the Domestic Uranium Industry.

The domestic uranium industry is currently in a non-viable condition. Although demand for nuclear fuel is at an all-time high, U.S. production has plummeted to levels prevailing in the 1950's. Employment has dropped from roughly 20,000 to about 2000 nation-wide. Capital investment in the industry has nose-dived. Exploration has all but ceased. Many communities dependent on the industry have been devastated.[9]

DOE initially declined to take action under section 161v. on the ground that the domestic uranium industry was viable and that its viability was assured.[10] DOE continued to maintain this position until September of 1985—over nine months after it had been sued in this proceeding—when the agency finally issued a formal determination that the industry was in fact "non-viable" in calendar year 1984. On September 24, 1986, DOE issued a formal determination that the industry was in fact "non-viable" in calendar year 1985. Conditions within the domestic uranium industry have not improved in 1986 or 1987. Employment and production remain largely stagnant at levels which represent a small fraction of those at the beginning of the decade. No turn-around is in sight. Indeed, the October 28, 1987 issue of the Wall Street Journal reports

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[9] *See, e.g., Hearing before the Energy & Power Subcomm. of the House Energy and Comm. Comm.*, 100th Cong., 1st Sess. (April 8, 1987) (testimony of Edward Farley).

[10] The Wall Street Journal caricatured DOE's position in a front page story contesting that representation, focussing on the devastating decline of the industry in Granta, New Mexico, and throughout the western mining districts. DOE references this story in its certiorari petition at p. 6 (Blundell, U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction).

on p. 1 that "the uranium industry is near death" and on p. 20 that it is "near collapse."[11]

D. DOE's Unlawful Failure to Act.

Despite the fact that the domestic uranium industry is now the most depressed of all U.S. mineral industries, despite the fact that DOE has admitted that the U.S. is rapidly headed toward indefinite and substantial dependence on foreign sources of supply,[12] and despite the fact that DOE now admits that the domestic uranium industry is clearly "non-viable," the agency has refused to limit enrichment of foreign—source uranium for domestic end-use as required under section 161v. of the AEA, 42 U.S.C. 2201v. Moreover, DOE has failed to take any other actions to alleviate the industry's distress[13] and has made it crystal clear that it will not implement enrichment limitations under section 161v. unless compelled to do so by the court.

DOE's latest grounds for refusing to act, which grounds were first pressed *after* the district court had issued the

[11] "Western Gloom: Resources-Rich Basin Finds Its Treasures Don't Bring Prosperity," *Wall St. J.*, October 28, 1987.

[12] *See, e.g.*, DOE Energy Information Administration, Domestic Uranium Mining and Milling Industry, 1984 Viability Assessment (approx. 60 % U.S. dependence on foreign uranium).

[13] In its Petition for Certiorari, the Government suggests that DOE has taken two actions to benefit domestic producers. Cert. Pet. at 8, citing some 1981 Hearings. The two alleged actions were a decision to continue to promote nuclear power and a decision not to distribute uranium from the government stockpile. Neither of these actions benefits domestic uranium producers over foreign producers; neither is adequate to assure domestic industry viability (as witnessed by DOE's acknowledgement that the industry subsequently became non-viable); and DOE in fact is distributing or planning to distribute uranium from the stockpile. *See Domestic Uranium Mining Industry, supra* note 7, at 117 (1985) (planned below-market stockpile distributions documented in DOE documents).

injunction at issue here,[14] are that limiting enrichment of foreign source uranium for domestic end-use would be ineffective in assisting the domestic uranium industry. As the Wall Street Journal, which DOE cites in its Petition for Certiorari, indicates, a reason for the collapse of the domestic uranium industry is "bonanza lodes discovered in Canada and elsewhere."[15] DOE projects a U.S. dependency on foreign-source uranium of at least 60%. Obviously if this market were available for domestic producers, there would be much more production, and a restored industry.[16] The efficacy of an enrichment limitation is further corroborated by the strong opposition of Canada and Australia to DOE implementation of section 161v.[17]

E. This Litigation.

Faced with DOE's recalcitrance, three domestic uranium producers on December 7, 1984, filed a multi-count complaint in United States District Court for the District of

[14] DOE first raised this ground in the stay request which it filed with the U.S. Court of Appeals. So far as Amici States can tell, all the citations in the agency's certiorari petition to alleged "findings" (actually, simply conclusory statements by DOE) in support of this ground are not part of the record before the district court on the cross-motions for summary judgment from which this appeal arises. In fact, most of the conclusory statements derive from a rulemaking subsequently conducted by DOE to adopt new enrichment criteria in an effort to moot a challenge to the agency's generic enrichment contracts. The conclusory statements emanating from the rulemaking are themselves unsupported in the rulemaking record. DOE's reliance on such statements in the Petition for Certiorari is blatant bootstrapping. Moreover, Duke Power Company has sued the agency to invalidate the new enrichment criteria on a variety of grounds. *See Duke Power Company v. DOE*, 830 F.2d 359 (D.C. Cir. 1987).

[15] *Western Gloom, supra* note 11, at 20.

[16] *See* Hearings, *supra* note 9.

[17] DOE references this opposition in its Cert. Pet. at 26 n.21. DOE was even more adamant in its Motion for Stay in Tenth Circuit, at 12 (noting that Canada states that the limitation "will severely disrupt Canadian exports").

Colorado for enforcement of section 161v. Insofar as is relevant here, the district court on cross-motions for summary judgment granted summary judgment to the three producers and against DOE on Count I of the Complaint. After inviting the parties to confer on the terms of an order, the district court on June 20, 1986, issued an order enjoining the Department of Energy from enriching foreign source uranium for domestic end-use in amounts greater than 25% through December of 1986, and barred such enrichment after January 1, 1987, pending a rulemaking to adopt other or alternative measures sufficient to maintain a viable domestic uranium industry. Rather than finally implement section 161v., DOE appealed to the United States Court of Appeals for the Tenth Circuit. On July 20, 1987, the court of appeals issued its decision affirming the district court's order.[18] The agency responded with a petition to this Court.

III. SUMMARY OF ARGUMENT

Section 161v. of the AEA imposes a mandatory duty on the Department of Energy to limit enrichment of foreign source uranium to the extent necessary to assure the maintenance of a viable domestic uranium industry. DOE admits that the domestic uranium industry is non-viable. The agency has plainly failed to limit enrichment of foreign

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[18] The district court, in response to Count II of the Complaint below, had also declared DOE's generic uranium enrichment contract null and void as inconsistent with then-existent uranium enrichment criteria. The Court of Appeals vacated this portion of the district court's judgment and remanded for a determination of standing on the part of the producers to contest the contract. The Court of Appeals rejected DOE's argument that the dispute over the contract was moot in view of revisions to the enrichment criteria, noting that the producers had raised substantive issues concerning the contract as well as procedural complaints. For more information on these legal issues, see Montange, *The Federal Uranium Enrichment Program and the Criteria and Full Cost Recovery Requirements of Section 161 of the Atomic Energy Act*, 2 J. Mineral L. & Policy 1 (1986-87).

source uranium as required by statute, or to do anything else that is sufficient to assure the maintenance of a viable domestic uranium industry. DOE is thus in clear violation of the statute. This point is amply confirmed by the legislative history, and by the interpretation, approved by the Joint Committee on Atomic Energy, given the statute by DOE's predecessor. DOE's claim that it will be "hurt" by implementing the statute is insupportable. The Government has ample means to protect itself from harm, if any, flowing from discharging the law, and cannot excuse itself from a mandatory duty.

DOE's various arguments concerning its wish to be a reliable supplier, its desire not to harm trade with Canada and Australia, its feelings toward GATT, and its interest in non-proliferation policies are totally unavailing. Upon analysis, nothing in the injunction will conflict with any legitimate concern raised by DOE; where there is a possible conflict, it is because Congress expressly rejected the arguments now advanced by DOE and decided instead to require the agency to maintain a viable domestic uranium industry. Indeed, contrary to the representations of DOE, the protestations of Canada and Australia point to the value for the domestic uranium industry of enforcing the statute, and are hardly grounds for not enforcing a statute largely directed against uranium imports from those two countries and from South Africa.

IV. ARGUMENT

There is neither a conflict in the Circuits nor a substantial question which warrants further review in this case. The unanimous judgments of the court of appeals and the district court below are correct.

A. Section 161v. Is Mandatory.

Section 161v. of the AEA, 42 U.S.C. 2201v, speaks in mandatory terms. It states that the agency "*shall*" issue criteria setting forth the terms and conditions under which enrichment services will be offered; that the agency "to

the extent necessary to assure the maintenance of a viable domestic uranium industry, *shall not offer* [enrichment] services" for foreign source uranium intended for domestic end-use; and that the written criteria "*shall*" set forth the conditions governing enrichment of foreign-source uranium for domestic end use. Emphasis added. "Shall" when used in a statute is ordinarily mandatory language. *E.g., Parsons v. Board of Parole*, 107 S.Ct. 2415, 2420 (1987); *Association of American Railroads v. Costle*, 562 F.2d 1310, 1312 (D.C.Cir. 1977); *Moon v. U.S. Dept. of Labor*, 727 F.2d 1315, 1318-19 (D.C.Cir. 1984).

Contrary to DOE's representations, the mandatory nature of section 161v. is corroborated by the relevant legislative history. In particular, when the Private Ownership of Special Nuclear Materials Act was considered by Congress in 1963-64, uranium producers expressed concern about the continued viability of the U.S. uranium industry.[19] Officials of DOE's predecessor, the AEC, responded that the agency would assure the maintenance of a viable domestic uranium industry by limiting enrichment of foreign source uranium or by taking other measures to limit importation of uranium under the general powers conferred by the AEA.[20] Representatives of the uranium producers responded that the issue should *not* be left to the AEC's discretion because producers required a more concrete and permanent assurance of federal commitment in order to make the investments necessary to maintain a viable domestic industry.[21] Congress accordingly adopted

[19] *See Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 1st Sess. 114-15 (1963); *Private Ownership of Special Nuclear Materials, 1964, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 2d Sess. 154 (1964). *See also* Montange, *supra*, at 13.

[20] 1964 Hearing, *supra*, at 5.

[21] 1964 Hearing, *supra*, at 155.

section 161v., which insofar as is relevant here, was language proposed by the uranium producers.[22] The only conclusion from this history is that the purpose of the uranium proviso in section 161v. is to assure that the Government acts to preserve the viability of the domestic uranium industry.[23] The mandatory nature of the uranium proviso is fully supported by the initial construction given the statute by the AEC. The Commission initially implemented the statute by barring enrichment of foreign-source uranium for domestic end-use in 1966.[24] Although the Commission acted in 1974 to remove the bar during the period 1978-83 due to now obviously erroneous forecasts concerning the future of the nuclear industry,[25] the Commission specifically informed Congress that it would reinstitute limits on as little as two days' notice[26] or take other actions halting imports if the viability of the domestic industry were ever again threatened.[27] In short, the legislative history and the original construction of the statute both sup-

[22] *See* Montange, *supra*, at 14-15.

[23] DOE refers to language in the legislative history to the effect that the uranium proviso is "flexible." That language refers to flexibility in that the proviso was not contrary to the General Agreement on Trade and Tariffs and afforded DOE some discretion in setting the amount of the enrichment limitation or in taking other steps (e.g., prohibitions on importing uranium) that would otherwise assure domestic uranium industry viability. *See* note 41 *infra*.

[24] *See* 31 Fed. Reg. 16479 (Dec. 23, 1966).

[25] *See* AEC, The Nuclear Industry 1 (1973); *Proposed Changes in AEC Contract Arrangements for Uranium Enriching Services, Hearings before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 7 (1973); *Uranium Enrichment: Heading for the Abyss*, 221 Science 730 (1983).

[26] *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use, Hearings before the Joint Comm. on Atomic Energy*, 93d Cong., 2d Sess. 6, 9, et seq. (1974) (testimony of General Counsel Mercer, AEC Commissioner Anders and others).

[27] 1974 Hearings, *supra*, at 8 and 232-33.

port a mandatory interpretation.[28]

The Government suggests that a mandatory interpretation of section 161v. would lead to absurd results (namely, no available nuclear fuel) if the United States lacked sufficient uranium reserves to meet its needs. Pet. Cert. at 19. But like arguments that Columbus would drop off the edge of the world in proposing to sail west, the Government's argument runs afoul of the facts. According to DOE figures, the United States has proven uranium reserves sufficient to meet *all* its requirements for at least 40 years, which is longer than the expected lifetimes of all existing nuclear power reactors.[29] The real point is that, absent DOE implementation of section 161v., only a small fraction of U.S. reserves will ever be employed.[30]

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[28] The fact that the legislative history and administrative practice confirm the mandatory nature of the uranium proviso in section 161v. fully distinguishes this Court's decision in *Young v. Community Nutrition Institute*, 106 S.Ct. 2360 (1986). In addition, unlike the situation in *Young*, where the Food and Drug Administration had taken alternative measures (tolerance levels) sufficient to assure the public health with respect to aflatoxins, the Government has here done nothing sufficient to assure the maintenance of a viable domestic uranium industry, as demonstrated by the Government's admission that the industry is non-viable.

[29] *Compare* DOE Energy Information Administration, 1985 Viability Assessment at 55 (1.7 billion pounds of reserves) *with id.* at 22 (table 13) (40 million pounds used per year domestically through turn of century).

[30] Such non-use of U.S. reserves is directly contrary to the interpretation of the statute rendered by DOE's predecessors. For example, AEC Chairman Schlesinger testified in 1972 that "if there are American reserves to be exploited, the intention would be that those reserves would be exploited." Mr. Schlesinger emphasized that the Government would implement section 161v. so as to assure a "viable and expanding" raw materials industry. *AEC Auth. Legislation for FY 1973, Hearings before the Jt. Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2328 (1972) *reprinted in Status of the Domestic Uranium Mining and Milling Industry: The Effect of Imports, Hearing before the Energy Res. & Dev. Subcomm. of the Senate Energy and Nat. Res. Comm.*, 97th Cong., 1st Sess. at 487 (1981).

DOE's current justification for inaction is that it need only act if an enrichment limitation is "necessary" to maintain uranium industry viability, and that it is not "necessary" because it would be potentially harmful to DOE's own business while not necessarily assuring long-term uranium industry viability. Pet. Cert. at 16. DOE, overlooking the fact that it moved for summary judgment and that it relied on other grounds before the district court,[31] adds that if the uranium industry now wishes to dispute the agency's counter-intuitive conclusion concerning potential harm to DOE and lack of benefit to uranium producers, the case should be remanded for trial. Pet. Cert. at 23.[32]

There are two ready responses to DOE's latest claim, neither of which involves any triable issue whatsoever. First, the statute requires the imposition of enrichment limitations if viability of the domestic uranium industry is threatened. The Government is simply refusing to act as Congress directed. But "[a]n agency may not confer upon itself power" to act in a fashion contrary to the provisions Congress has made. *Louisiana Public Service v. F.C.C.*, 106 S.Ct. 1890, 1901 (1986). As this Court there said,

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[31] DOE argued in district court that its implementation of section 161v. was subject to congressional oversight, and because Congress had not compelled DOE to limit enrichment of foreign-source uranium by adopting a specific import limit (presumably in violation of GATT), the court should not enforce section 161v. *See* Memorandum in Support of Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment . . ., dated Sept. 30, 1985, at 17-26, in *Western Nuclear v. Huffman*, CA 84-C-2315.

[32] DOE claims at 23 n.17 of its Petition that the domestic producers "have never challenged the Secretary's determination that restrictions would not assure the maintenance of a viable domestic uranium industry." This is false. Both the producers and the Amici States have demonstrated both in the litigation and in congressional testimony that enrichment limitations would assist the domestic uranium industry. U.S. utilities are importing foreign uranium for domestic end-use. If they cannot enrich foreign uranium at DOE, which provides over 90% of the enrichment services used by U.S. utilities, the utilities will use additional domestic uranium.

> "[t]o permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress. This we are both unwilling and unable to do."

Second, the federal government has ample power to render the uranium proviso in section 161v. fully effective. DOE's predecessor, the AEC, testified to Congress that if the Government's enrichment business were ever threatened, or if for some other reason an enrichment limitation would not be the best method to assure uranium industry viability, then it would limit importation of uranium or enriched uranium under other provisions of the AEA.[33] AEC did not testify that the government could do nothing, nor did Congress understand section 161v. to permit inaction, which is hardly surprising since the uranium proviso in section 161v. was clearly adopted to *compel* action. In addition, the AEC indicated that the AEA conferred all the necessary authority to formulate supplementary relief if in fact required.[34] Nothing in the statutes abolishing the AEC or establishing DOE or its sister agency, the NRC, altered any of the relevant authorities provided by the AEA. DOE accordingly has ample authority, either on its own or in conjunction with the licensing jurisdiction of the NRC,[35] to limit importation of enriched uranium under

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[33] *See Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 1st Sess., at 29-30 (1963); *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use, Hearings before the Jt. Comm. on Atomic Energy*, 93d Cong., 2d Sess., at 8, 232-33 (1974).

[34] *See* sources in note 33 *supra*.

[35] NRC has broad authority to regulate, limit and bar importation of enriched uranium under sections 161b., i, and p. of the Atomic Energy Act. *See Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979). NRC has acknowledged in response to questions from Congress that it can act to limit importation of enriched uranium in order to protect DOE's enrichment enterprise or the viability of the uranium industry upon proper request from, among others, DOE. *See* answers attached to Opposition to Emergency Motion for Stay filed by Amici States in the Tenth Circuit. The Chairman of the House Interior Committee (one of the authorizing committees with jurisdiction over the DOE and NRC) in a recent colloquy upon adoption of the NRC Authorization Bill for fiscal 1988 and 1989 (H.R. 1315) confirmed NRC's authority in this regard. 133 Cong. Rec. H 7036 (August 4, 1987) (Cong. Udall and Cong. Richardson). *See also id.* H 7159 (August 5, 1987) (similar statement by Cong. Nielson). Such action is certainly consistent with prior AEC statements concerning its powers. *See* 1974 Hearings, *supra*, at 8 and 232-33.

sections 161b. and 161p. of the AEA, 42 U.S.C. 2201b. & p.[36] These provisions authorize the implementing agency to adopt regulations and orders as it "may deem necessary [or] desirable to promote the common defense and security" or "as may be necessary to carry out the purposes of [the Atomic Energy Act]." One of those purposes to whose accomplishment these provisions are devoted is maintenance of the viability of the domestic uranium industry (*see* section 161v. of the Act). It is also noteworthy that Congress adopted the uranium viability proviso at least in part for national security reasons. It follows that DOE can, just as the AEC could, require domestic utilities to obtain their enrichment services from the Government. *Compare Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979). DOE alone or with NRC can thus render 161v. fully effective through use of other portions of section 161. Seen in this light, any injury sustained by DOE will be purely self-inflicted, and the agency's claims that nothing can be done for the domestic uranium industry are purely spurious.[37]

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[36] That DOE shares authority with NRC under sections 161b. and p. is clear. H. Rep. 93-707 at 27 and S. Rep. 93-980 at 84 (both agencies have authority under Energy Reorganization Act).

[37] The Government's only response to this point—the contention that authority to regulate imports now rests exclusively with the NRC, Cert. Pet. at 8—is thus clearly incorrect, and at the very least insufficient, misleading and unavailing.

The judiciary is the final authority on matters of statutory construction. *E.g., FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973). "If the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). Here the intent of Congress is clear. DOE is attempting to create ambiguity through smoke and mirrors. The agency's latest interpretation of the statute to this end violates the language of the AEA, ignores the legislative history of the relevant portions of the Act, and conflicts with a prior consistently held agency interpretation.[38] DOE's latest construction thus does not command respect. *See, e.g., INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 n.30 (1987); *Santa Fe Pacific Railroad Company v. Secretary of the Interior*, 830 F.2d 1168, ____n.91 (D.C. Cir. 1987) (collecting authorities).

DOE's claim concerning loss of business is hollow for other reasons as well. First, U.S. utilities have been extremely reluctant to go abroad for enrichment services, both because of cancellation penalties in DOE contracts and because of unreliability of foreign enrichment supplies. Second, publicly available information—including DOE data—shows that there is insufficient foreign capacity available to support wholesale diversion of business from DOE.[39] DOE's whole argument in this area is a *post hoc*

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[38] The prior construction is entitled to special respect since it was approved by the Joint Comm. on Atomic Energy. *See Power Reactor Dev. Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408-09 (1961).

[39] According to the Congressional Budget Office, there are currently 5 to 6 million SWU's per year of excess capacity in Europe. CBO, U.S. Enrichment Options for a Competitive Program 17 (1985). This amount is expected to erode to only 2 to 3 million SWU's by about 1990. *See id.* at 15 and 17. There are approximately 6 million SWU's per year of uncommitted demand in the 1990's. *Id.* at 14. The uncommitted demand thus more than balances out available foreign excess capacity. CBO's figures on capacity and demand are equivalent to those given by DOE to the "Tricommittee Business Panel," *supra*, at 51-52.

rationalization for a policy in favor of unrestricted trade in uranium, which is directly contrary to the mandatory language of a statute.

B. The Decision Below Poses No Important Federal Question.

The final six pages of DOE's Petition for Certiorari embody an attempt to provide some sort of rationale for regarding this case as worthy of certiorari. We will address DOE's various contentions briefly here.

DOE asserts that the most important problem with the district court's injunction is that countries on whom the United States will be dependent for uranium (specifically, Canada and Australia) have objected to it and have argued that it is inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT). Pet. Cert. at 25-26. GATT is not a treaty or statute and thus cannot override section 161v. The United States Trade Representative has informed Congress that implementation of section 161v. will not violate GATT.[40] In addition, Congress in adopting section 161v. specifically stated that it is not inconsistent with GATT.[41] Finally, neither Canada nor Australia pursued GATT claims when the United States implemented section 161v. through enrichment limitations during the period 1966 though 1983, presumably because

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[40] Letter, Mr. Yeutter (U.S. Trade Rep.) to Cong. Udall (Chairman, House Interior Comm.), July 15, 1985 (enrichment limitation does not infringe GATT because it is a condition under which U.S. Government renders a service).

[41] S. Rep. No. 1325, 88th Cong., 2d Sess., reprinted in 1964 U.S. Code Cong & Admin News 3105, 3121 ("these reasonable and flexible restrictions on the performance of services by the Commission should not in any sense be deemed inconsistent with any obligations the United States may have under . . . [GATT] and other international trade agreements"). We also note that under Article XXI of GATT, the United States can impose whatever restrictions it chooses on trade in fissionable materials, of which uranium is the prime example, without infringement of GATT.

they recognized that such claims would not be fruitful. DOE cannot use the objections of foreign governments against whom a statute is directed in the trade area as a grounds to evade the statute; the fact that the foreign governments are objecting to it is certainly not grounds for a writ of certiorari. The foreign objections are relevant only to show that the statute if implemented will be helpful in restoring a viable domestic uranium industry.

DOE also states that the injunction will inconvenience U.S. utilities which have purchased foreign uranium, because they will have to arrange alternative supplies. Pet. Cert. at 24.[42] U.S. utilities have been on notice since at least the filing of this lawsuit (some three years ago) that enrichment limitations may be imposed. Again, possible inconvenience to a few utilities which have been on notice for at least three years is neither grounds for a writ nor grounds to ignore section 161v.

DOE next claims that the injunction may result in loss of business to DOE. Pet. Cert. at 24-25. We have noted above a variety of reasons (a) why the injunction cannot result in any significant loss of such business and (b) why DOE can prevent any significant loss of business by doing exactly what its predecessor agency said it would do under those circumstances: either invoke authority under sections 161b. & p. of the AEA to limit importation of enriched material by order or regulation, or (now, through NRC) by imposing license conditions barring or limiting such importation for domestic consumption. DOE's conjectured losses can thus hardly create an issue worthy of certiorari.

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[42] DOE does not argue that there are no domestic uranium supplies available to meet U.S. needs. To the contrary, DOE argues that there is an oversupply. As already noted, DOE figures show that there are domestic reserves sufficient to meet U.S. needs for 40 years. Thus, domestic utilities will have ample uranium to meet their needs in the event that the injunction is enforced.

Finally, DOE claims that the injunction "threatens American non-proliferation efforts" by possibly resulting in the "loss of DOE's foreign enrichment customers" and by making the U.S. appear to be an "unreliable supplier" of nuclear technology. Pet. Cert. at 26-27. As to non-proliferation, the injunction only operates against *domestic use* of foreign-source uranium. DOE can continue to enrich foreign uranium for foreign use. The injunction thus has no direct effect on any of DOE's foreign accounts, and any conjectured indirect effect is highly implausible. DOE's intimations to the contrary are comparable to Chicken Little's remarks about the sky falling. DOE's claim about appearing to be an "unreliable supplier" is at best empty rhetoric. Nothing in the injunction interferes with any sales or transfers of U.S. nuclear material or technology by anyone in the United States to any foreign government or entity. In any event, a necessary condition to accomplishment of a goal of consistency and reliability of supply is that the agency comply with the law of the land as enacted by Congress, and not periodically ignore the law in favor of the passing whims of a constantly changing parade of unelected officials administering the enrichment program.

V. CONCLUSION

DOE's Deputy Assistant Secretary for Enrichment Longenecker on August 4, 1987, characterized DOE's position in a fashion at odds with the Petition for Certiorari. Mr. Longenecker explained that DOE has "the largest market share, the lowest production costs, and most advanced technology development effort of any supplier [of enrichment in the world]."[43] DOE in fact controls over 90 % of the domestic market for enrichment services. This is hardly the picture of a party in peril, which DOE attempts to draw in this legal proceeding. In contrast, DOE admits

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[43] Letter, John Longenecker to Secretary of Energy Herrington, August 4, 1987.

that the domestic uranium industry sustained more than $300,000,000 in losses in calendar 1984 and again in calendar 1985.[44] As stated in the Wall Street Journal on October 28, the uranium industry is "near death."

It is time for DOE to take action to assure the maintenance of a viable domestic uranium industry as required by section 161v. Indeed, the judiciary is obligated to compel DOE to act in the face of the agency's clear track record of obfuscation and delay. 5 U.S.C. 706(1). The district court and the Court of Appeals for the Tenth Circuit have merely discharged this obligation in the proceeding below. It is now time to bring this litigation to a close.

Amici States therefore respectfully request that this Court deny DOE's petition for certiorari.

Respectfully submitted,

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[44] *See* DOE EIA, Domestic Uranium Mining and Milling Industry, 1985 Viability Assessment at p. xiii.